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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1597

CANAL KEYHEA,
Appellant,

VS.

J. J. ENOMOTO, Director of the Department of Corrections for the State of California, et al.,
Appellees.

On Appeal from the Court of Appeal for the State of California, First Appellate District

MOTION TO DISMISS OR AFFIRM

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SUBJECT INDEX

	Page
Opinion below	2
Jurisdiction	2
Question presented	2
Statement of the case	2
A. Introduction	2
B. Proceedings below	5
Summary of appellees' argument	8
Argument	9
I	
As the decision below does not come within the provisions of Title 28, United States Code Section 1257(2) no appeal lies	9
II	
This Court's opinion in Vitek v. Jones should not be held to apply retroactively	10
III	
Appellant's equal protection claims should not be reached by this Court because they were neither decided nor reached below and because the record is not sufficient for the claims to be decided by this Court	12
Conclusion	13

TABLE OF AUTHORITIES CITED

Cases

	Page
Addington v. Texas, 441 U.S. 418 (1979)	10
Brown v. Pitchess, 13 Cal.3d 518, 119 Cal.Rptr. 204, 531 P.2d 772 (1975)	5
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	11
Kulko v. California Superior Court, 436 U.S. 84 (1978)	10
Morrissey v. Brewer, 408 U.S. 471 (1972)	11
Preiser v. Rodriguez, 411 U.S. 475 (1973)	7
Vitek v. Jones, ... U.S. ..., 100 S.Ct. 1254 (No. 78-1155, March 25, 1980)	2, 9, 10, 11, 13
Williams v. Horvath, 16 Cal.3d 834, 129 Cal.Rptr. 453, 548 P.2d 1125 (1976)	5
Wolff v. McDonnell, 418 U.S. 539 (1974)	11

Statutes

California Code of Civil Procedure, section 526a	6
California Penal Code, section 2684	3, 5, 8, 9
Title 28, United States Code section 1257	9
Title 28, United States Code section 1257(2)	2, 5, 8, 9, 10
Title 28, United States Code section 2103	2, 8
Title 42, United States Code section 1983	3, 5, 7

Rule

Rules of the Supreme Court of the United States, Rule 16	1

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On Appeal from the Court of Appeal for the State of California, First Appellate District

MOTION TO DISMISS OR AFFIRM

Pursuant to rule 16, revised rules of this Court, appellees move to dismiss the appeal on the grounds that it does not present a substantial federal question, and that the judgment of the state court below is not in favor of the validity of any state statute challenged by appellant as repugnant to the Constitution of the United States. In the alternative, appellees move to affirm the judgment of the California Court of Appeal on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

If, pursuant to Title 28, United States Code section 2103, the appeal is treated as a petition for writ of certiorari, appellees submit that the petition should be denied.

OPINION BELOW

On December 21, 1979, the California Court of Appeal filed its decision affirming dismissal of appellant's civil action in the Superior Court of California. This unpublished decision is set out in Appendix B of this motion. By order filed January 18, 1980, the Court of Appeal modified its opinion and denied rehearing. On February 27, 1980, the Supreme Court of California denied hearing. These orders denying rehearing and denying hearing are also set out in Appendix B of this motion.

JURISDICTION

Appellant invokes the jurisdiction of this Court under Title 28, United States Code section 1257(2).

QUESTION PRESENTED

Whether this Court's opinion in *Vitek v. Jones,* ..... U.S. ....., 100 S.Ct. 1254 (No. 78-1155, March 25, 1980) applies retroactively so as to require expungement of records of past transfers of state prisoners who have since been discharged from all custody.

STATEMENT OF THE CASE

A. Introduction

Appellant, Canal Keyhea, was a California state prisoner sentenced in 1969 upon conviction of robbery and in 1972 upon conviction of attempted murder.

In February 1977 appellant was transferred from an institution of the California Department of Corrections to an institution of the California Department of Mental Hygiene pursuant to Penal Code section 2684.[1]

In July 1977 appellant filed his original complaint in the Superior Court of California for the County of Solano purporting to commence a civil rights action under Title 42, United States Code section 1983 on behalf of appellant individually and as a class action on behalf of all others

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[1]At the time of appellant's transfer Penal Code section 2684 provided as follows:

> "If, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient, or insane person confined in a state prison may be expedited by treatment at any one of the state hospitals under the jurisdiction of the Department of Mental Hygiene, the Director of Corrections, with the approval of the Adult Authority, shall certify that fact to the Director of Mental Hygiene who may authorize receipt of such prisoner at one of such hospitals for care and treatment. The superintendent of the hospital shall receive the prisoner and keep him until in the opinion of the superintendent such person has been treated to such an extent that he will not benefit from further care and treatment in a state hospital."

Penal Code section 2684 has since been amended and now reads as follows:

> "If, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient, or insane person confined in a state prison may be expedited by treatment at any one of the state hospitals under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the Director of Corrections, with the approval of the Board of Prison Terms for persons sentenced pursuant to subdivision (b) of Section 1168, shall certify that fact to the director of the appropriate department who shall evaluate the prisoner to determine if he would benefit from care and treatment in a state hospital. If the director of the appropriate department so determines, the superintendent of the hospital shall receive the prisoner and keep him until in the opinion of the superintendent such person has been treated to such an extent that he will not benefit from further care and treatment in the state hospital."

similarly situated. In November 1977 an amended complaint was filed in the superior court to add to the action a taxpayers' action under state law. In January 1978 appellees filed a demurrer to the amended complaint. In March 1978 appellant, and the taxpayers, filed an amendment to the amended complaint.

In May 1978 appellant was released on parole.

In October 1978 the superior court sustained appellees' demurrer with leave to appellant to amend the complaint. Upon appellant's failure to further amend the complaint and at appellant's request, the superior court entered judgment of dismissal of the action. The order of the superior court sustaining appellees' demurrer and the judgment of dismissal are set out in Appendix A of this motion.

In December 1978 appellant filed notice of appeal to the California Court of Appeal.

In July 1979 appellant was returned to state prison for a 90-day period of observation. In November 1979 appellant was released from prison and discharged from all custody (Appellant's Jurisdictional Statement, p. 7).

On December 21, 1979, the California Court of Appeal filed its opinion affirming dismissal of the action as to appellant Keyhea individually and determining that Keyhea is not a proper representative of the alleged class of all others similarly situated. The Court of Appeal reversed the judgment of dismissal as to the taxpayers' action. On January 18, 1979, the Court of Appeal denied rehearing and on February 27, 1980, the Supreme Court of California denied hearing. The opinion of the California Court of

Appeal, the order denying rehearing, and the order denying hearing are set out in Appendix B of this motion.

On or about March 6, 1980, appellant filed in the California Court of Appeal his notice of appeal to this Court pursuant to Title 28, United States Code section 1257(2). The notice of appeal states the appeal is "... from the final judgment of the Court of Appeal of the State of California, affirming the dismissal of the complaint as to Canal Keyhea ...." The notice of appeal is set out in Appendix B of this motion.

On April 25, 1980, on remand from the California Court of Appeal, Superior Court Judge Randall overruled appellees' demurrer with respect to the taxpayers' action and permitted appellees' thirty days within which to file an answer. This order of the superior court is set out in Appendix C of this motion.

B. Proceedings Below

Approximately five months after appellant's 1977 transfer from the Department of Corrections to the Department of Mental Hygiene appellant initiated a civil action in a California state court under 42 United States Code section 1983.[2] Appellant's complaint challenged as repugnant to the Constitution of the United States administrative regulations governing involuntary psychotropic medication within the Department of Corrections, and California Penal Code section 2684 and administrative regulations and

[2]California state courts are authorized to exercise concurrent jurisdiction in actions under 42 United States Code section 1983. *Brown v. Pitchess*, 13 Cal.3d 518, 119 Cal.Rptr. 204, 531 P.2d 772 (1975); *Williams v. Horvath*, 16 Cal.3d 834, 837, 129 Cal.Rptr. 453, 548 P.2d 1125 (1976).

practices implementing the statute governing transfer of mentally ill state prisoners from an institution of the Department of Corrections to an institution of the Department of Mental Hygiene. The complaint sought only declaratory and injunctive relief, and not monetary relief, upon allegations that involuntary medication and involuntary interdepartmental transfer were not attended by minimum procedural due process safeguards required by the Constitution of the United States. The action was alleged as an individual action on behalf of Keyhea and as a class action on behalf of all other state prisoners similarly situated. The original complaint appears at CT 1-30.[3]

The first-amended complaint, filed November 17, 1977, repeated appellant's allegations in the original complaint and added allegations by state taxpayers for a taxpayers' action under California Code of Civil Procedure section 526a. The first-amended complaint appears at CT 31-62. A subsequent amendment to the first-amended complaint, filed March 2, 1978, appears at CT 207-212. The taxpayers' action challenges only involuntary medication within the Department of Corrections. Appellant's individual action and putative class action challenged both involuntary medication and involuntary interdepartmental transfer.

Neither the original complaint, nor the first-amended complaint, nor the amendment to the first-amended complaint allege that appellant, or any other person subject to the challenged provisions, in fact was not mentally ill.

[3]"CT" refers to the superior court Clerk's Transcript on appeal to the California Court of Appeal. This transcript is the primary record upon which the Court of Appeal relied for its decision.

The complaint sought declarations that regulations and practices involving involuntary medication and involuntary interdepartmental transfer are constitutionally infirm for failure to provide sufficient features of procedural due process, an injunction barring involuntary medication or involuntary interdepartmental transfer without following numerous specific provisions of due process alleged necessary in the complaint (for involuntary medication, CT 39:13-40:1; for involuntary interdepartmental transfer, CT 48:16-49:1), and on behalf of Keyhea individually, and not on behalf of other members of the putative class, an injunction against retention of plaintiff at the state hospital[4] and an injunction ordering expungement of all references in Keyhea's records to forced drugging and to interdepartmental transfer (CT 52-53).

On October 12, 1978, the superior court filed its order sustaining appellees' demurrer upon four specified grounds: (1) lack of jurisdiction in the superior court for appellant's failure to have exhausted state administrative remedies; (2) insufficiency of allegations in the complaint to meet class action criteria; (3) insufficiency of the complaint to state a cause of action under 42 United States Code section 1983; (4) insufficiency of the complaint to state a state taxpayers' action under state law. The order of the superior court is set out in Appendix A of this motion. In light of the superior court's order sustaining appellees' demurrer, appellant's statement in the jurisdictional statement that the trial court rejected on the

[4]It would appear that such relief may not be had in an action under Title 42, United States Code section 1983. *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

merits appellant's claims that Penal Code section 2684 violated due process and equal protection (Jurisdictional Statement, p. 8) should not be taken to mean that the trial court determined the statute valid under the Constitution.

The decision of the California Court of Appeal, as a matter of state law, reinstated the taxpayers' action challenging involuntary medication within the Department of Corrections. The state Court of Appeal affirmed, however, the trial court's judgment of dismissal of appellant's action upon the ground that appellant's intervening discharge from all custody rendered the action moot as to Keyhea individually, and rendered Keyhea an improper representative of the class.

SUMMARY OF APPELLEES' ARGUMENT

As the decision of the California Court of Appeal did not determine that Penal Code section 2684, or any other statute or regulation challenged in the underlying action as repugnant to the Constitution, is valid under the Constitution, no appeal lies under Title 28, United States Code section 1257(2).

Appellant's jurisdictional statement specifies that he does not appeal disposition of his claims respecting involuntary medication (Jurisdictional Statement, p. 5). Appellant does not appeal the determination of the Court of Appeal that appellant is not a proper class representative.

If, pursuant to Title 28, United States Code section 2103, the appeal is treated as a petition for writ of certiorari, the petition should be denied. The principal federal question sought to be resolved in appellant's underlying

action has now been definitively resolved by this Court in *Vitek v. Jones, supra.* This Court should reject appellant's request that the opinion in *Vitek v. Jones* be made fully retroactive so as to require expungement of records of appellant's interdepartmental transfer. This Court should also decline to reach appellant's argument that equal protection requires that the same due process govern both state prisoner transfers and involuntary civil commitments to state mental hospitals.

ARGUMENT

I

AS THE DECISION BELOW DOES NOT COME WITHIN THE PROVISIONS OF TITLE 28, UNITED STATES CODE SECTION 1257(2) NO APPEAL LIES

Title 28, United States Code section 1257 provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . . (2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Although appellant challenged the validity of California Penal Code section 2684, and the validity of implementing regulations and administrative practices under the statute, in the superior court and on appeal to the California Court of Appeal neither court rendered a decision that the statute, or regulations and practices under the statute, are valid under the Constitution or laws of the United States.

The California superior court sustained appellees' demurrer upon the superior court's view of the sufficiency of the complaint. Upon appellant's failure to amend the complaint and upon appellant's request judgment of dismissal was entered by the superior court. The California Court of Appeal affirmed dismissal of appellant's action upon the ground that appellant's intervening complete discharge from all custody rendered appellant's action moot.

As the state court decision from which the appeal is taken did not determine that a challenged state law is valid under the Constitution or laws of the United States it is appropriate for this Court to determine that no appeal lies under Title 28, United States Code section 1257(2). *Kulko v. California Superior Court,* 436 U.S. 84, 90 (1978); *Addington v. Texas,* 441 U.S. 418, 422-423 (1979).

II

THIS COURT'S OPINION IN VITEK v. JONES SHOULD NOT BE HELD TO APPLY RETROACTIVELY

This Court's opinion in *Vitek v. Jones,* ..... U.S. ....., 100 S.Ct. 1254 (1980), specifies the minimum due process required for involuntary transfer of state prisoners from a correctional institution to a state mental hospital for treatment of mental illness. This decision therefore resolves the principal federal question sought to have been litigated in appellant's state court action.

Although appellant has been completely discharged from all custody, and therefore is no longer subject to the proceedings to which the *Vitek* procedures would apply, he nevertheless wishes to litigate in this Court his entitlement to expungement of state records of his interdepartmental transfer. Such relief would require this Court to determine that the decision in *Vitek v. Jones* is fully retroactive.

To apply *Vitek v. Jones* to all past interdepartmental transfers would cast enormous administrative burdens on the departments of corrections and the mental health departments of the several states, and would not be consistent with the opinions of this Court from which the procedures in *Vitek v. Jones* were taken. For purposes of this motion appellees do not now have available statistics from other states or from the Federal Bureau of Prisons regarding the annual number of such interdepartmental transfers. However, available California statistics indicate that approximately 125 such transfers have occurred annually in California's system.

In determining what process is due, this Court in *Vitek v. Jones* relied upon the opinions in *Morrissey v. Brewer,* 408 U.S. 471 (1972) (due process at parole revocation proceedings); *Wolff v. McDonnell,* 418 U.S. 539 (1974) (due process at serious prison disciplinary proceedings), and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) (due process at probation revocation proceedings). These decisions are each prospective only. Indeed, in *Wolff v. McDonnell, supra,* retroactivity was sought for the same reason that appellant seeks retroactivity in the instant action: to require that records of past proceedings which did not meet the new procedural rules be expunged. *Wolff v. McDonnell, supra,* 418 U.S. at 573.

III

APPELLANT'S EQUAL PROTECTION CLAIMS SHOULD NOT BE REACHED BY THIS COURT BECAUSE THEY WERE NEITHER DECIDED NOR REACHED BELOW AND BECAUSE THE RECORD IS NOT SUFFICIENT FOR THE CLAIMS TO BE DECIDED BY THIS COURT

Appellant woud have this Court note probable jurisdiction to determine that the equal protection clause requires that the same due process should apply both to involuntary transfers of state prisoners to state mental hospitals and to involuntary civil commitments to state mental hospitals. Appellant urged equal protection claims in the trial court and in the Court of Appeal as an alternative theory to obtain a specification of minimum procedural safeguards at proceedings for interdepartmental transfers of state prisoners. However, neither the trial court nor the Court of Appeal reached or decided these claims.

Appellant would nevertheless have this Court litigate his equal protection claims in the first instance. Resolution of appellant's equal protection argument would seem to require a great deal more information respecting state statutes, regulations, decisional law, and practices than is available in the record in this appeal. Also necessary to such litigation would be evidence of the nature and weight of the involved public interests, and private interests.

We note that appellant's equal protection argument risks a result which may be anomalous. Thus, this Court having determined the specific minimum requirements of due process for involuntary transfers of state prisoners to a

state mental hospital, it would appear that appellant's view of the equal protection clause would be satisfied by abridging the procedural rights now typically afforded at civil commitment hearings to limit such hearings to *Vitek* procedures. To the extent such a result would be at risk in litigation of appellant's equal protection claims in this Court, it is clear that indispensable interests would not be able to appear as parties.

CONCLUSION

For the above reasons appellees respectfully urge this Court to dismiss the appeal or to summarily affirm the decision of the California Court of Appeal. If the appellant's jurisdictional statement be treated as a petition for writ of certiorari, appellees respectfully urge that it be denied.

Dated: May 12, 1980

Respectfully submitted,

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(Appendices follow)

APPENDICES

Appendix A

In the Superior Court
of the
State of California
in and for the
County of Solano
Department No. 3

No. 67432

Canal Keyhea, et al.,
Plaintiffs,

vs.

J. J. Enomoto, et al.,
Defendants.

[Filed Oct. 13, 1978]

ORDER SUSTAINING DEMURRER

Defendants' demurrer was heard on February 17, 1978. Plaintiff appeared by Peter J. Sheehan. Deputy Attorney General Karl S. Mayer appeared for defendants. The last letter brief was filed on July 21, 1978.

The court has carefully read and considered the points and authorities presented by the parties. The court notes the complaint was filed on July 15, 1977. Plaintiffs were allowed to amend the complaint and later added an amendment to the amendment. The posture of the case as pointed out by defendants is that the complaint pleads a federal civil rights action, a taxpayer's action, a class action, mul-

tiple demands for declaratory and injunctive relief, including expungement of records, thirteen distinct state and federal constitutional provisions, four distinct state and federal statutes, a number of Department of Corrections, Community Release Board and Department of Health regulations to consider and an unnecessary large number of defendants. Defendants complain "though the action as framed may seem to be a law review editor's delight, it is a judge's and a litigant's nightmare".

Defendants' demurrer is contained in thirty-nine objections to five causes of action in the first amended complaint. Plaintiffs' answer to defendants' objections is contained in 64 pages of contrary reasoning. More briefs and differing contentions are stated back and forth in many more pages of memoranda.

The court has spent many, many hours in an attempt to reconcile the opposing points of view and finds and concludes for purposes of this demurrer as follows:

(1) The court has no jurisdiction of this action as it does not appear in the complaint that plaintiffs have exhausted their administrative remedies.

(2) The complaint does not allege sufficient facts to meet class action criteria.

(3) The complaint does not state sufficient facts to constitute a cause of action under 42 U.S.C. Section 1983.

(4) The complaint does not state facts alleging a proper state taxpayers' action under C.C.P. Section 526a.

For the reasons stated above, the court does not reach the remaining grounds of demurrer advanced by defendants. Accordingly,

IT IS HEREBY ORDERED that said demurrer be and the same is hereby sustained with thirty (30) days allowed to amend.

Dated: October 12th, 1978.

/s/ ELLIS R. RANDALL
Judge of the Superior Court

In the Superior Court
of the
State of California
in and for the
County of Solano

No. 67432

Canal Keyhea, et al.,
Plaintiffs,

vs.

J. J. Enomoto, et al.,
Defendants.

[Filed Nov. 28, 1978]

JUDGMENT OF DISMISSAL AFTER ORDER SUSTAINING DEMURRER

WHEREAS, defendants' demurrer to plaintiffs' First Amended Complaint and amendment thereto has been sustained and the time within which the Court granted leave to amend said complaint has expired and plaintiffs have failed to file any amended complaint; and

WHEREAS, said order sustaining the demurrer herein was rendered on October 12, 1978, and plaintiffs were served notice of said ruling on October 18, 1978; and application has been made to the Clerk of this Court for entry

of judgment in favor of defendants and against plaintiffs and good cause appearing therefor;

IT IS ORDERED, ADJUDGED, AND DECREED that this action be and the same hereby is, dismissed with prejudice; plaintiffs to take nothing by this action.

Dated: Nov. 27, 1978

ELLIS R. RANDALL
Judge of the Superior Court

Appendix B

In the Court of Appeal
of the
State of California

First Appellate District

Division Four

1 Civil No. 45908
(Sup. Ct. No. 67432)

Canal Keyhea, et al.,
Plaintiffs and Appellants,

vs.

J. J. Enomoto, et al.,
Defendants and Respondents.

[Filed Dec. 21, 1979]

Canal Keyhea (Keyhea) filed a complaint in the Solano County Superior Court for declaratory and injunctive relief against J. J. Enomoto, Director of the Department of Corrections; T. L. Clannon, Superintendent of the California Medical Facility; Jerome Lackner, Director of the California Department of Mental Health; Sylvia Winters, Medical Director of Patton State Hospital; Howard Way, former Chairman of the California Adult Authority and present Chairman of the Community Release Board; their agents, employees, and successors in interest (respondents).

A first amended complaint was filed to include as plaintiffs Valamar A. Schaaf and Evelyn Schaaf, two state taxpayers, and to include a class action.

The first amended complaint seeks a declaratory judgment that Penal Code sections 2684 and 2685, which provide for the transfer and commitment of state prisoners to state mental hospitals and Department of Corrections Administrative Manual section 346.15, which provides for the involuntary administration of a psychotropic drug to state prisoners are unconstitutional; an injunction against expending public money and time in enforcing Administrative Manual section 346.15; an injunction against subjecting Keyhea and the class to the involuntary administration of drugs unless the following occurs: a compelling state interest is shown, there is no less onerous alternative and a mandatory hearing incorporating due process procedures is afforded prior to the drugging; an injunction requiring respondents to adhere to the provisions of Administrative Manual section 346.15; an injunction against transferring Keyhea and the class to a state mental hospital without procedural due process protections; an injunction against retention of Keyhea at Patton State Hospital; and an injunction requiring expungement from Keyhea's records any reference to his transfer.

The court filed an order sustaining respondents' demurrer with leave to amend on the following grounds: (1) the court has no jurisdiction as Keyhea has not exhausted his administrative remedies; (2) the complaint does not allege sufficient facts to meet class action criteria; (3) the complaint does not state sufficient facts to constitute a

cause of action under 42 United States Code, section 1983; (4) the complaint does not state facts alleging a proper state taxpayers' action under Code of Civil Procedure section 526a.

The trial court did not reach or rule upon the remaining grounds of demurrer advanced by appellants, including the ground that the first amended complaint did not allege facts sufficient to constitute a cause of action, and we do not rule on that ground at this time. Appellants failed to further amend their complaint. Judgment of dismissal was entered. The appeal is from the judgment.

Keyhea was a state prisoner confined at the Correctional Medical Facility at Vacaville until February 1977.[1] While at Vacaville, psychotropic drugs were administered to Keyhea without his consent.

On March 18, 1977, Keyhea was transferred from the Correctional Medical Facility operated by the Department of Corrections to Patton State Hospital, a hospital for mentally disordered individuals, operated by the Department of Health. Keyhea remained at Patton State Hospital until May 19, 1978, when he was released on parole. On July 19, 1979, Keyhea was returned to state prison for a 90-day psychiatric observation. The 90-day period has now

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[1]Since the trial court sustained respondents' demurrer we must accept the allegations of appellant's first amended complaint as true, determining whether such allegations state, or can be amended to state, a cause of action. (See Griffith v. Department of Public Works (1956) 141 Cal.App.2d 376, 379-380.)

expired. It also appears that his parole period has now expired and that he is entitled to discharge from custody.[2]

Appellants Valamar Schaaf and Evelyn Schaaf have alleged in the first amended complaint that section 346.15 of the California Department of Corrections Administrative Manual is unconstitutional, thus expenditure of funds pursuant to section 346.15 is illegal and wasteful.

Appellants Schaaf assert standing pursuant to Code of Civil Procedure section 526a, which provides that "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city, or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. . . ."

The issue before us is whether Code of Civil Procedure section 526a applies to suits directed at state agencies and state officials despite its omission of any reference to such parties.

Appellants rely upon several cases which have held that a liberal interpretation of section 526a includes suits against state agencies and officials. (Adams v. Department of Motor Vehicles (1974) 11 Cal.3d 146; Serrano v. Priest (1971) 5 Cal.3d 584; Blair v. Pitchess (1971) 5 Cal.3d 258;

[2]The information relative to Keyhea's parole and discharge is supplied by the Attorney General and is not contradicted by appellants' counsel.

Marin Hospital Dist. v. Department of Health (1979) 92 Cal.App.3d 442; Los Altos Property Owners Assn. v. Hutcheon (1977) 69 Cal.App.3d 22; Duskin v. San Francisco Redevelopment Agency (1973) 31 Cal.App.3d 769.)

Respondents contend that a major flaw appears in all of these cases in that each case has relied upon the holding in preceding cases and by so doing has perpetuated an erroneous interpretation of section 526a. In *Ahlgren v. Carr* (1962) 209 Cal.App.2d 248, the court discussed the *common law* right of a taxpayer to enjoin an unlawful expenditure of state funds. The discussion made no reference to Code of Civil Procedure section 526a. Under common law authority, "a taxpayer may sue a governmental body in a representative capacity in cases involving fraud, collusion, ultra vires, or failure on the part of the governmental body to perform a duty specifically enjoined." (Gogerty v. Coachella Valley Junior College Dist. (1962) 57 Cal.2d 727, 730.) Relying upon *Gogerty*, which found that the common law theory was not limited to municipalities, but applied to all governmental bodies, the court in *Ahlgren* held that a taxpayer has the right to maintain an action against state officers and agencies. (Ahlgren v. Carr, *supra*, 209 Cal.App.2d 248 at p. 254.) In *California State Employees' Assn. v. Williams* (1970) 7 Cal.App.3d 390, the court cited *Ahlgren v. Carr*, as authority for holding that the taxpayer/plaintiff had a common law right to bring an action against the state.

The defective interpretation of section 526a, according to respondents, began with *Blair v. Pitchess, supra*, 5 Cal. 3d 258, which relied upon *Ahlgren v. Carr* and *California*

State Employees' Assn. v. Williams, supra, as support for its statement that "it has been held that taxpayers may sue *state* officials to enjoin such officials from illegally expending state funds [under Code of Civil Procedure section 526a"] (emphasis in original) (Blair v. Pitchess, *supra,* 5 Cal.3d 258 at p. 268). Obviously, the court erred in relying upon either case as authority for the right of taxpayers to sue state officials under section 526a when both cases dealt solely with the common law theory and not with the statutory rule. With its genesis in *Blair v. Pitchess,* the erroneous interpretation continued. In *Serrano v. Priest, supra,* 5 Cal.3d 584, the court stated in a footnote that "it has been held that state officers too may be sued under section 526a. (Blair v. Pitchess, *ante,* p. 258, at p. 267; California State Employees' Assn. v. Williams (1970) 7 Cal.App.3d 390, 395 [86 Cal.Rptr. 305]; Ahlgren v. Carr (1962) 209 Cal.App.2d 248, 252-254 [25 Cal. Rptr. 887])." (*Id.,* at p. 618, fn. 38.) *Blair* was again cited in *Adams v. Department of Motor Vehicles, supra,* 11 Cal. 3d 146, 151 and *Duskin v. San Francisco Redevelopment Agency, supra,* 31 Cal.App.3d 769, 773, for authority that state officials may be sued under section 526a.

Respondents further claim that the Court of Appeal cases have utilized the liberal, albeit erroneous, interpretation of section 526a to extend coverage of section 526a to school districts (Los Altos Property Owners Assn. v. Hutcheon, *supra,* 69 Cal.App.3d 22, 26-30) and to hospital districts (Marin Hospital Dist. v. Department of Health, *supra,* 92 Cal.App.3d 442 at p. 450).

Respondents further contend that it is clear from a study of the cases that the Supreme Court's erroneous holding in *Blair v. Pitchess* has been repeated.[3] Section 526a states that only certain governmental bodies are subject to a taxpayer's suit. The State of California is clearly omitted from the section and it does not appear that such omission was an oversight on the part of the Legislature. Section 526a was adopted in 1909 (ch. 348, § 1, p. 578), amended in 1911 (ch. 71, § 1, p. 87), and 1967 (ch. 706, § 1, p. 2080). Had the Legislature intended to extend coverage to the State of California, then surely the omission would have been corrected by now. This court is bound by the clear wording of the statute and may not provide additional words to alter its purpose. (People v. Knowles (1950) 35 Cal.2d 175, 183.)

Nevertheless, our Supreme Court in *Serrano v. Priest, supra,* 5 Cal.3d 584 at page 618, footnote 38, stated: "It has been held that state officers too may be sued under section 526a," and again in *Stanton v. Mott* (1976) 17 Cal. 3d 206, 223, the court cited section 526a as authority for a taxpayer to sue a state officer. In addition, there is another authority which gives a taxpayer the right to sue state agencies and state officials; the common law. The common law theory, however, is limited to certain grounds for bringing suit against the state: "fraud, collusion, ultra vires, or a failure . . . to perform a duty specifically enjoined" (Silver v. City of Los Angeles (1961) 57 Cal.2d 39, 40-41).

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[3]The court in *Los Altos Property Owners Assn. v. Hutcheon, supra,* 69 Cal.App.3d 22, noted that the *Ahlgren* case did not make any reference to section 526a. (*Id.,* at p. 27, fn. 6.)

In order for appellants Schaaf to assert standing under the common law rule, their allegation of wrongdoing must fall within one of the classifications specified in *Silver*. Appellants Schaaf contend that respondent California Department of Corrections unlawfully expended funds pursuant to an allegedly unconstitutional section in the department's Administrative Manual. The court in *Ahlgren v. Carr, supra,* 209 Cal.App.2d 248, found that, under the common law rule, plaintiff taxpayers have a right to sue state officials for illegally expending public funds. Although the court did not specify which *Silver* classification such action comes within, by deductive reasoning it is clear that the illegal expenditure was an ultra vires act of the governmental body. There were no facts in *Ahlgren* to support the remaining three classifications: fraud, collusion nor failure of the state to perform a duty enjoined. The court in *Wirin v. Horrall* (1948) 85 Cal.App.2d 497, specifically held that an illegal expenditure of public funds is an ultra vires act. (*Id.*, at pp. 504-505.)

Thus, appellants, as taxpayers, have standing to bring an action against state officers and the trial court erred in sustaining the demurrer on this ground.

II

The trial court held "The court has no jurisdiction of this action as it does not appear in the complaint that plaintiffs have exhausted their administrative remedies." Generally, where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will

act. (See Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280.)

Appellant Keyhea, however, contends that under the circumstances of this case, exhaustion of remedies would be futile. His argument is based upon the premise that raising a constitutional challenge to a state statute before an administrative agency which does not have the power to declare the statute unconstitutional would be a futile act.

There has been a consensus in California courts that exhaustion of remedies is a prerequisite to judicial relief even where the statute to be applied is challenged on constitutional grounds. (United States v. Superior Court (1941) 19 Cal.2d 189, 195; Morton v. Superior Court (1970) 9 Cal.App.3d 977; Walker v. Munro (1960) 178 Cal.App.2d 67.) *Walker v. Munro* has been criticized and disapproved in *State of California v. Superior Court* (1974) 12 Cal.3d 237, 250-251, where the Supreme Court allowed the petitioner to challenge the constitutionality of the Coastal Zone Conservation Act in court without first raising the issue before the Coastal Zone Conservation Commission. The court noted that "since an administrative agency is not the appropriate forum in which to challenge the constitutionality of the basic statute under which it operates, there seems little reason to require a litigant to raise the constitutional issue in proceedings before the agency as a condition of raising that issue in the courts." (*Id.*, at p. 251.)

However, in a later case, *Southern Pac. Transportation Co. v. Public Utilities Com.* (1976) 18 Cal.3d 308, the Supreme Court held that the Public Utilities Commission

may declare a duly enacted statute unconstitutional. The court noted that the Constitution and statutes of this state grant the commission wide administrative, legislative and judicial powers. (*Id.*, at p. 311, fn. 2.)

It is unclear, as pointed out in *Hand v. Board of Examiners* (1977) 66 Cal.App.3d 605, how *Southern Pac. Transportation Co.* can be reconciled with *State of California v. Superior Court*. The court in *Hand* concluded that the most reasonable manner in which these two cases can be harmonized is to construe *Southern Pac. Transportation Co.* as allowing only those administrative agencies which are of constitutional origin to determine constitutional challenges to statutes enacted by the Legislature. (*Id.*, at p. 619.)

It has not yet been determined by an appellate court whether the Department of Corrections is an agency of constitutional origin. Although the Department of Corrections was not specifically created by the Constitution, it was created by the Legislature in the exercise of a delegation conferred on it by an express provision of the Constitution. The question, however, of whether agencies of constitutional origin or legislative origin have the power to declare statutes unconstitutional is no longer material. In 1978, article III, section 3.5 of the California Constitution, was amended to provide that administrative agencies are without power to determine constitutional challenges to legislative enactments. It specifically states that:

> "Sec. 3.5. An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

> "(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> "(b) To declare a statute unconstitutional;
>
> "(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

On the basis of this constitutional amendment alone, we must conclude that the Department of Corrections, be it an agency of constitutional origin or legislative origin, may not decide the constitutional challenges raised by Keyhea. Since the only issues appellant Keyhea raises are of a constitutional nature, he is exempt from exhausting his administrative remedies before seeking judicial relief. (Hand v. Board of Examiners, *supra*, 66 Cal.App.3d 605, at p. 619.) Thus, the court erred in concluding that appellant Keyhea had a duty to exhaust, but failed to exhaust, his administrative remedies.

III

Appellant Keyhea alleges that he represents an ascertainable class.

Code of Civil Procedure section 382 provides that "when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." The requirements for sustaining a class action are clear: (1) there must be an ascertainable class and (2) there must be a well defined community of

interest in the questions of law and fact involved affecting the parties to be represented. (Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, 704.)

The first requisite for maintenance of a class action, ascertainability of the class, presents a serious obstacle in the case at bench. The number of members is indefinite and although we do not require the identity of the individual members of the class, it is a prerequisite to establish the existence of an ascertainable class. It is not possible to ascertain what persons will be incarcerated in the future in a state prison and subject to the provisions of Administrative Manual section 346.15 and Penal Code sections 2684 and 2685. In *Alvarez v. Wiley* (1977) 71 Cal. App.3d 599, the court held that a class action could not be sustained where the complaint alleges that members of the class consist of future heroin addicts confined in the Tulare County Jail. (*Id.*, at p. 602.)

In *Gonzales v. State of California* (1977) 68 Cal.App.3d 621, the court found that including as members of the class all persons who will suffer in the future convictions under Vehicle Code section 23102, subdivision (a), would result in an incognizable and unmanageable class of plaintiffs. (*Id.*, at p. 629.)

It does not appear from the record that appellant Keyhea is now a member of the interested class he claims to represent, a requisite element to the maintenance of a class action. (LaSala v. American Sav. & Loan Assn. (1971) 5 Cal.3d 864, 875 and all cases cited at p. 875, fn. 7.) There is no community of interest between appellant Keyhea and the other members of the class for they are

not similarly situated since Keyhea is no long incarcerated in the state prison nor subject to Administrative Manual section 346.15 and to Penal Code sections 2684 and 2685.

At the time of filing his complaint on July 15, 1977, appellant Keyhea was confined at Patton State Hospital. He was, however, released on parole on May 19, 1978, approximately five months before the court filed an order sustaining the demurrer to the first amended complaint. He was subsequently returned to prison for 90 days but that period has now expired. Also, it appears that Keyhea's parole period has now expired and that he is entitled to or has been discharged from custody.

In support of his contention that he continues to represent the class despite his present status, appellant Keyhea cites us to *Geraghty v. United States Parole Commission* (1978) 579 F.2d 238. In that case, it is held that once a *class action is certified,* the mooting of a claim set forth by the named plaintiff does not automatically deprive a court of jurisdiction over the cause of action asserted by the class. (*Id.*, at p. 248.) Keyhea's suit, however, was not properly certified as a class action *before* he was released on parole, thus it is not jurisdictionally appropriate to continue to entertain the suit. (See Geraghty v. United States Parole Commission, *supra,* 579 F.2d 238.)

IV

It is unnecessary to determine whether appellants' contentions state sufficient facts to constitute a cause of action under 42 United States Code, section 1983, since the action has become moot due to Keyhea's discharge

from custody. Although the trial court did not consider the issue of mootness raised in the demurrer, it is our prerogative to determine whether the action is moot. If any of the grounds raised in the demurrer are sustainable, we must affirm the trial court's ruling. (Gonzales v. State of California, *supra,* 68 Cal.App.3d 621 at p. 627.)

At the time Keyhea filed the first amended complaint, he was confined in Patton State Hospital. However, he was released on parole before the trial court issued its order sustaining the demurrer.

"[A]lthough a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a moot case or question which will not be considered by the court." (Wilson v. L. A. County Civil Service Com. (1952) 112 Cal.App.2d 450, 453.)

Here, we have no actual controversy as to Keyhea. He is no longer subjected to Penal Code sections 2684 and 2685 and Administrative Manual section 346.15. Any rights Keyhea may have had pursuant to those provisions do not presently exist.

Appellant Keyhea relies upon three federal cases to support his proposition that an inmate's release on parole does not render the action moot. (Evans v. Paderick (1977) 443 F.Supp. 583; Souder v. McGuire (1976) 423 F.Supp. 830; Fhagen v. Miller (1969) 306 F.Supp. 634.) Although all three inmates challenged the constitutionality of the procedures authorizing commitment to a state mental hospital, none of the inmates had been released

on parole. Each inmate had been returned to prison at the time of the judicial determination of the issues. Yet, the courts found that the actions were not moot, especially in light of each inmate's history of prior commitments to the state mental hospital.

The possibility of future commitments of Keyhea appears remote and speculative. At the present time there are no facts to support the contention that Keyhea, now discharged, will be recommitted. Due to the absence of a justiciable controversy, this court is unable to render an effective decree responsive to appellants' complaint.

The judgment of dismissal is affirmed as to Canal Keyhea, individually and on behalf of all others similarly situated. The judgment is reversed as to Valamar A. Schaaf and Evelyn Schaaf and the cause is remanded to the trial court for further proceedings consistent with this opinion. Appellants Valamar A. Schaaf and Evelyn Schaaf to recover their costs on appeal. The other parties to bear their own costs on appeal.

Caldecott, P. J.

We concur:

Rattigan, J.

Christian, J.

Court of Appeal of the State of California

First Appellate District

Division Four

1 Civ. No. 45908
Superior Court No. 67432

Canal Keyhea, et al.,
Plaintiffs and Appellants,

vs.

J. J. Enomoto, et al.,
Defendants and Respondents.

[Filed Jan. 18, 1980]

ORDER MODIFYING OPINION
AND DENYING REHEARING.

BY THE COURT:

It is ordered that the opinion filed herein on December 21, 1979, be modified in the following particulars:

On page 1, line 1 should be changed to read as follows:

Canal Keyhea (Keyhea) filed a complaint on behalf of himself and all others similarly situated in the [the sentence then continues as is with no other changes].

On page 1, line 12 should end with a period after the word taxpayers; line 13 should be deleted.

On page 3, line 15 (beginning of the third full paragraph), the date March 18, should be changed to February 3.

On page 16, a new paragraph should begin after line 16, which will read:

Appellant's request to take judicial notice is granted.

The petitions for rehearing are denied.

Dated Jan. 18, 1980

CALDECOTT, P.J.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Feb. 27, 1980

I have this day filed Order

_____

_____

_____

HEARING DENIED

_____

_____

_____

In re: 1 Civ. No. 45908

Keyhea et al.

vs.

J. J. Enomoto, et al.

Respectfully,

G. E. BISHEL
Clerk

68378-877 2-79 4M OSP

1 Civil No. 45908

In the Court of Appeal
of the
State of California

First Appellate District

Division Four

Canal Keyhea,
Appellant,

vs.

J. J. Enomoto, et al.,
Appellees.

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Canal Keyhea, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, affirming the dismissal of the complaint as to Canal Keyhea, entered in this action on March 4, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: March 6, 1980

/s/ PETER E. SHEEHAN
PETER E. SHEEHAN
Counsel for Appellant

[Proof of Service Omitted]

Appendix C

In the Superior Court
of the
State of California
in and for the County of Solano
Department No. 3

No. 67432

Canal Keyhea, individually and on behalf of all others similarly situated, Valamar A. Schaaf, and Evelyn Schaaf,
Plaintiffs,

vs.

J. J. Enomoto, individually and in his official capacity as Director of the Department of Corrections for the State of California: T. L. Clanon, individually, et al.,
Defendants.

[Filed April 25, 1980]

ORDER OVERRULING DEFENDANTS' DEMURRER TO COUNTS ONE AND FIVE OF THE COMPLAINT

The above-entitled proceeding came on regularly for hearing on February 17, 1978, on the defendants' demurrer; plaintiffs being represented by PETER E. SHEEHAN and defendants being represented by KARL S. MAYER, Deputy Attorney General.

FACTS

The Court of Appeal having affirmed the judgment of dismissal as to complainant, CANAL KEYHEA, individually, and on behalf of all others similarly situated. There remains for decision the Attorney General's demurrer to Counts One and Five of the complaint, wherein complainants, VALAMAR A. SCHAAF and EVELYN SCHAAF seek injunctive and declaratory relief as taxpayers of the State of California, under their common law right to sue state agencies and state officials for illegal expenditures of public funds.

The issues left unresolved by the decision of the Court of Appeal consist of four asserted grounds for dismissal:

(1) As to both counts, the Attorney General asserts that the complaint and allegations thereunder are "uncertain";

(2) As to Count One, it is claimed that the Court lacks power to enjoin the exercise of a public office, in a lawful manner, by the person in possession;

(3) As to Count One, the Attorney General points out that the complaint first recites that Administrative Manual Section 346.15 is followed in all cases, then requests that an injunction issue compelling defendants to adhere to the provision of that same section;

(4) As to Count Five, the Attorney General asserts that the Administrative actions challenged therein are not a proper subject for declaratory relief.

ANALYSIS

The Attorney General fails to specify what is uncertain about the complaint and the allegations thereunder with respect to Counts One and Five. The Court, therefore, finds that said complaint is certain, and overrules the demurrer on this ground.

Similarly, the Attorney General fails to explain his assertion that a public office is being exercised "in a lawful manner", in view of the complaint's claim that the statutes and administrative regulations under which the office is exercised are unconstitutional and hence unlawful. The demurrer is overruled on this ground as well.

The Attorney General correctly points out an anomaly in the complaint where it is asserted that Administrative Manual Section 346.15 is followed in all cases, and then seeks an order to compel adherence to its provisions. This unusual allegation presents no basis for injunctive or declaratory relief. However, the claim is harmless and the demurrer is overruled.

With respect to the asserted impropriety of the declaratory relief sought by Count five of the complaint, *State of California v. Superior Court* (1974) 12 C.3d 237 reveals that such relief is available where the constitutionality of a rule is challenged, but is not available where particular application of the rule to the complainant is challenged. (Id. at 251). In the present case, the taxpayer-complainants assert that Administrative Manual Section 346.15 is unconstitutional and that all actions taken by defendants under

its aegis are unlawful. They are clearly *not* seeking review of a particular administrative decision, and thus, are not confined to the provisions of Code of Civil Procedure, Section 1094.5. The demurrer must therefore be overruled on this final ground.

All other grounds of demurrer have been considered and the same are hereby overruled. Defendants shall be allowed thirty (30) days to answer.

DATED: April 24, 1980.

ELLIS R. RANDALL

Judge of the Superior Court